Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1979

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J. JOSEPH GARRAHY AND
BRADFORD E. SOUTHWORTH et al.,
*Petitioners,*

vs.

NICHOLAS PALMIGIANO and
LEONARD JEFFERSON *et al.*,
*Respondents.*

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MATTHEW L. MYERS
ALVIN J. BRONSTEIN
EDWARD I. KOREN
National Prison Project of
the American Civil Liberties
Union Foundation
1346 Connecticut Avenue N.W.
Suite 1031
Washington, D.C. 20036
202-331-0500

ROBERT MANN
344 Wickenden St.
Providence, Rhode
Island 02903

*Attorneys for Respondents*

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Respondents in the above entitled consolidated cases, who represent the plaintiff class of all persons confined in the Rhode Island Adult Correctional Institutions, hereby oppose the Petition for a Writ of Certiorari filed by the Petitioners to review a judgment of the United States Court of Appeals, for the First Circuit, entered in these cases on March 3, 1980.

## QUESTION PRESENTED

Whether 42 U.S.C. § 1988 required the Court below to reduce the award of attorneys' fees to the plaintiffs below the amount the court concluded to be reasonable solely because several of the lawyers were salaried employees of a public interest organization?

## STATEMENT OF THE CASE

This case comes before the Court on the defendants Petition for a Writ of Certiorari to review a decision issued by the United States Court of Appeals for the First Circuit affirming decisions by the United States District Court in *Palmigiano, et al. v. Garrahy, et al.*, 466 F.Supp.732 (D.R.I. 1979) and *Jefferson, et al. v. Southworth, et al.*, C.A. No. 77-554, unpublished opinion (D.R.I. 1979) which awarded the prevailing plaintiffs in each case reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988. The sole issue raised by the defendants' Petition is whether the lower courts were required to reduce the amount of the attorneys' fees award below the amount which the District Court determined to be reasonable solely because several of the lawyers for the plaintiffs are salaried employees of a privately funded non-profit public interest organization. The Petitioners do not challenge any other aspects of the attorneys' fees award and do not otherwise challenge the reasonableness of the amount of the award.

The attorneys' fees award in *Palmigiano* was based upon the work of counsel for the plaintiffs in a successful class action challenging virtually every aspect of prison life in Rhode Island. 443 F.Supp. 956 (D.R.I. 1977). After extensive discovery and a lengthy trial in April 1977 the District Court issued its Opinion on August 10, 1977, finding, among other things, that the:

> . . . lack of sanitation, lighting, heating and ventilation, and the noise, idleness, fear and violence, and the absence or inadequacy of programs of classification, education, physical exercise, vocational training or other constructive activity *create a total environment where debilitation is inevitable,* and which is unfit for human

> habitation and shocking to the conscience of a reasonable civilized person. *Palmigiano v. Garrahy,* 443 F.Supp. 956,979 (D.R.I. 1977).

As the District Court noted in its February 22, 1979 attorneys' fees Opinion:

> The case challenged virtually every aspect of prison life and required more than good legal competency to conduct and manage the pretrial discovery stage successfully, and, in the courtroom, develop with probative evidentiary clarity the denouement of prison life at the ACI with all its inhumane unconstitutional aspects.
>
> * * *
>
> These factors can best be realized by noting the comprehensiveness of the case which encompassed the totality of prison life in Rhode Island. The unconstitutional conditions attacked were the filth and deterioration of the maximum security building, its unsanitary, inadequate and dangerous plumbing and electric lighting, the intolerable noise level within the section, the inadequate heating and ventilating system – guards and inmates wore heavy coats day and night – the existing fire hazards, deplorable food service – presenting imminent danger to public health – health standards in the infirmary, collapse of the classification process, the rampant fear and violence throughout the prison, the intolerable idleness of inmates for lack of programs, the comingling of pretrial detainees and convicted felons, lack of drug abuse programs, deficiencies in medical services which were a threat to the lives of the inmates; in short, the plaintiffs developed their case in all these areas in an in-

> stitution which, as stated by one expert, had "all the egregious deficiencies that could possibly exist" and as another expert testified was the only prison he ever visited for which he could find nothing good to say. In the August 10th Opinion this Court noted the enormous preparation and presentation required by this case: "After extensive discovery, a trial was held which extended over two weeks. The findings of fact required by Fed.R.Civ.P.52 was set forth herein and are based on the testimony received at trial, stipulations by the parties and extensive exhibits, including depositions of various officers of the Department of Corrections. The Court's task was made easier by the extensive assistance of experts from various fields of corrections, institutional environmental health and sanitation and correctional psychology". *Palmigiano, supra,* at 960.
>
> — 466 F.Supp. 732, 734,735 (D.R.I. 1979)

The attorneys' fees award in *Jefferson v. Southworth,* was based upon a successful challenge by the plaintiffs to the constitutionality of a general lock-up instituted on August 26, 1977 at the state's Maximum Security Facility. 477 F.Supp. 179 (D.R.I. 1978). After a series of hearings held in September and November 1977 and January 1978 the District Court issued its Opinion in favor of the plaintiffs on February 3, 1978 in which it found:

> The defendants, in the absence of an existing emergency, have locked the prisoners in their cells for approximately 22 hours a day; and although there has been a modification of this confinement, over fifty percent are still so confined on the day of this writing. Such isolation has exacerbated the uncontradicted, indeed admitted,

> inhumane living conditions set forth in *Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977) (Palmigiano)*. Even more devastating, the isolation has undermined the inmates' emotional capacity to cope with those inhumane conditions by depriving them of the aid, emotional support and social context, which they derived from contact with other inmates, their families and attorneys. This confinement has resulted in increased tensions, depression and a sense of hopelessness in the inmates. The deleterious effects, alone and in conjunction with the inhumane conditions existing before the lockup, are of such magnitude as to constitute a clear violation of the Eighth Amendment's proscription against cruel and unusual punishment.
>
> – 447 F.Supp. 179, 181 (D.R.I. 1978)

No appeal was taken from the August 10, 1977 Opinion in *Palmigiano* and an appeal taken from the February 3, 1978 Opinion in *Jefferson* was dismissed by stipulation of the parties.

In both cases counsel for the plaintiffs filed a timely application for attorneys' fees and costs pursuant to 42 U.S.C. § 1988. In support of both applications the plaintiffs filed detailed Affidavits which provided the District Court with a full and specific accounting of the expenses incurred and every hour for which compensation was sought. Hearings were held before the District Court in December 1978 and January 1979 and on February 22, 1979 the District Court issued its Opinion on the plaintiffs' application in both cases. In each opinion the District Court carefully and meticuously analyzed the plaintiffs' applications in accordance with the criteria already established by the First Circuit in *King v. Greenblatt,* 560

F.2d 1024 (1st Cir. 1977). The defendants' filed a timely Notice of Appeal and on March 3, 1980 the First Circuit affirmed in every respect the judgments of the District Court. At no time during the appeal process have the defendants challenged the criteria established by the First Circuit in *King v. Greenblatt, supra,* or the District Court's application of the *King* criteria to these cases. Thus, the Appeal before the First Circuit was limited to the single and narrow issue raised by the present petition.*

## REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

### I. THE PETITION FOR A WRIT OF CERTIORARI WAS NOT FILED ON TIME.

The Judgment by the United States Court of Appeals for the First Circuit was entered on March 3, 1980. The Petition for a Writ of Certiorari then became due no later than June 2, 1980. On the very day the Petition for Certiorari was due the petitioners filed an "Application for an Extension of Time." On June 11, 1980 Mr. Justice Brennan signed an order extending the petitioners' time to file their Petition for a Writ of Certiorari to June 16, 1980 "without prejudice to the Court's consideration of whether [the] application has been timely filed." (Letter of June 11, 1980 from Michael Rodak, Jr. to William G. Brody).

Rule 34(a) of the Rules of the Supreme Court provides that applications for an extension of time to file petitions for certiorari "shall be submitted at least ten days before

*As the petitioners indicated in their application to Mr. Justice Brennan for an extension of time in which to file their Petition, the Court of Appeals denied their request for a stay of the judgment and the amount of the judgment is being paid.

the period sought to be extended and will not be granted except in the *most extraordinary circumstances* if filed during the last ten days of such period." (Emphasis added). The petitioners' application was filed in direct violation of the ten-day rule and no extraordinary circumstances exist. The sole reason for the application for the extension given by the petitioners was a printing delay allegedly caused by the length of the pertinent District Court opinions included in the Appendix and the fact that the printing firm was in the process of moving its facilities. The petitioner could have and should have been aware of both of these facts well before the final deadline for filing their petition for a Writ of Certiorari and could easily have avoided the need for the extension. In addition, neither District Court opinion is unusually lengthy. Therefore, petitioners Application for an Extension was filed in violation of Rule 34(2) and the reasons given for this action can in no way be considered "most extraordinary circumstances."

## II. THE ISSUE RAISED BY THE PETITIONERS HAS BEEN CONSIDERED BY NUMEROUS COURTS OF APPEALS AND REJECTED BY EVERYONE WHICH CONSIDERED IT.

The sole issue raised by the Petitioners in their Petition for a Writ of Certiorari is a very narrow one: Must a trial court in a civil rights action reduce the amount of an award of attorneys' fees to the plaintiffs below the amount which the Court concluded was warranted and reasonable solely because counsel for the plaintiffs are salaried employees of a not for profit public interest organization. The Petitioners do not challenge the plaintiffs' right to attorneys' fees pursuant to 42 U.S.C. § 1988 in this case, nor do they in any other way challenge the reasonableness of

the fee awarded by the Lower Court. Further, they do not raise any federal constitutional questions.

A substantial number of Courts of Appeals have already considered and rejected the Petitioners contention that fee awards under the Civil Rights Attorneys' Fees Act, 42 U.S.C. § 1988, or other comparable statutes, must be reduced when the prevailing party has been represented by a public interest organization. *Lund v. Affleck,* 587 F.2d 75 (1st Cir. 1978); *Reynolds v. Coomey,* 567 F.2d 1166 (1st Cir. 1978); *Beazer v. New York City Transit Authority,* 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds,* 440 U.S. 568 (1979); *Rodriguez v. Taylor,* 569 F.2d 1231, 1247-1248 (3rd Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Tillman v. Wheaton-Haven Recreation Assn.,* 517 F.2d 1141 (4th Cir. 1975); *Northcross v. Bd. of Education of the Memphis City Schools,* 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3798 (June 9, 1980); *Moore v. Townsend,* 525 F.2d 482, 486 (7th Cir. 1975); *Hairston v. R & R Apartments,* 510 F.2d 1090, 1092-1093 (7th Cir. 1975); *Oldham v. Ehrlich,* 617 F.2d 163 (8th Cir. March 12, 1980); *Dennis v. Chang,* 611 F.2d 1302 (9th Cir. 1980). Prior to *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), the Fifth Circuit also considered and rejected the Petitioners' contention in a case applying the then used "private attorney general" theory, *Fairley v. Patterson,* 493 F.2d 598 (5th Cir. 1974). The Petitioners' contention was also considered in a slightly different context and rejected by the United States Court of Appeals for the District of Columbia in *National Treasury Employees Union v. Nixon,* 521 F.2d 317 (D.C. Cir. 1975).

Thus, since the passage of 42 U.S.C. § 1988 six Courts of Appeals have considered and rejected the Petitioners' contention as applied to this or other comparable statutes.

Similar decisions in four other Courts of Appeals issued prior to the passage of 42 U.S.C. § 1988 indicate that in all likelihood they would reach the same conclusion. No Court of Appeals considering 42 U.S.C. § 1988 or any other comparable statute has held that an attorneys' fees award which is reasonable in every other respect must be reduced solely because the prevailing party has been represented by a salaried attorney of a non-profit public interest organization.

What is remarkable about the Courts which have considered the issue raised by the Petitioners is the uniformity of both their reasoning and their conclusions. The recent decision of the Eighth Circuit in *Oldham v. Ehrlich, supra,* is representative:

> Next to decide is whether the court acted within its discretion in reducing the attorneys' fees award because plaintiffs had legal aid attorneys. Although a court may consider a large number of factors in arriving at a reasonable attorneys' fee under 42 U.S.C. § 1988, *e.g., Zoll v. Eastern Allamakee Community School District,* 588 F.2d 246, 252 & n.11 (8th Cir. 1978), we conclude it is inappropriate to consider that the prevailing plaintiff's attorney was working for a legal aid organization. The basic purpose of section 1988 — to encourage enforcement and observance of civil rights — permits no distinction between private attorneys and legal aid organizations. Legal aid organizations can expand their services to indigent civil rights complaints by virtue of their receipt of attorneys' fees. And a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plaintiff could not afford private

> counsel. Thus, whether the focus is on enabling suit by those otherwise unable to afford litigation, or on deterring misconduct by imposing a monetary burden upon the wrongdoers, a legal organization merits an attorneys' fee fully as much as does the private attorney.
>
> 617 F.2d at 168.

In *Reynolds v. Coomey,* 567 F.2d 1166 (1st Cir. 1978), the First Circuit held:

> Attorney's fees are, of course, to be awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner.
>
> — 567 F.2d at 1167

Analyzing a statute similar to 42 U.S.C. § 1988 the Fourth Circuit in *Tillman v. Wheaton-Haven Recreation Assn., supra* at 1148 stated:

> Litigation to secure the full measure of the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Acts. Consequently, when an allowance of attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services. It should not be diminished because the attorney has agreed to contribute the money, . . . to a civil rights organization. . .

The recent holding of the Third Circuit in *Rodriguez v. Taylor,* 569 F.2d 1231 (3rd Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) is also typical:

> Legal services salaries are generally considerably lower than salaries paid associates in private firms who have comparable experience and cre-

> dentials. This salary differential need bear no relation to the quality of representation, in general or in a particular case, or to the benefits received by clients . . . . Reference to absolute salary levels is about as reasonable as deriving the reasonable value of a federal judge's time from his or her salary. Thus, we hold that the district court misused its discretion by emphasizing the factor of absolute salaries paid by CLS in deriving an hourly rate of compensation.
>
> — 569 F.2d at 1248.

## III. THE DECISION OF THE FIRST CIRCUIT IS AMPLY SUPPORTED BY BOTH THE LEGISLATIVE HISTORY OF 42 U.S.C. § 1988 AND THE POLICY CONSIDERATIONS WHICH LED TO ITS PASSAGE.

The decision of the First Circuit rejecting the appellants' contention that that District Court erred by its decision not to reduce the amount of the attorney's fees to be awarded to the plaintiffs because several of their attorneys are employed by a non-profit public interest organization is amply supported by the legislative history of 42 U.S.C. § 1988. The legislative history states that "a prevailing party is entitled to counsel fees even if represented by an organization . . . ." House Report, No. 94-1558, 94th Cong., 2d Sess. 8, n. 16 (1976). Within the last month this Court in *New York Gaslight Club, Inc. v. Carey,* No. 79-192, 48 U.S.L.W. 4645, ____ U.S. ____ at footnote 9 (June 9, 1980) specifically recognized that Congress endorsed the award of attorneys fees to public interest organizations under 42 U.S.C. § 1988.

Neither the Senate Report, nor the House Report draw a distinction between employees of public interest organizations and members of the private bar. *House Report,*

*supra;* Senate Report No. 94-1011, 94th Cong., 2d Session 6. The cases cited by the House Report as correctly applying the standards for determining a reasonable attorney's fee when the prevailing party is represented by employees of an organization all reject any distinction between employees of public interest organizations and members of the private bar. *Torres v. Sachs,* 538 F.2d 10, 12 (2d Cir. 1976); *Incarcerated Men of Allen County v. Fair,* 507 F.2d 281 (6th Cir. 1974); *Fairley v. Patterson,* 493 F.2d 598 (5th Cir. 1974). For example, in *Fairley* the Fifth Circuit held:

> This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellants' attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee. . . . Whether the attorney charges a fee or has an agreement that the organization that employs him will receive any awarded attorneys' fees are not bases on which to deny or limit attorneys' fees or expenses.
> — 493 F.2d 598, 606-7, (1974).

The holding in *Torres* was identical:

> We agree with the courts which have held that the "allowable fees and expenses may not be reduced because [the prevailing party's] attorney was employed . . . by a civil rights organization . . . or because the attorney does not exact a fee."
> — 538 F.2d at 13.

The Senate Report is equally as supportive of the Respondents' position and expressly states that fees awarded pursuant to the Act should be paid according to the same standards by which attorneys are compensated by fee-paying clients. Senate Report No. 94-1011, 94th

Cong., 2d Sess. at 6. The cases cited by the Senate Report as correctly applying the standards for determining a reasonable fee also rejected as irrelevant the attorney's status as a salaried employee of a public interest organization. See *Davis v. County of Los Angeles,* 8 FEP Cases 244 (C.D.Cal. 1974); *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 66 F.R.D. 483 (W.D.N.C. 1975).

## CONCLUSION

For the foregoing reasons, this is not a case where "there are special and important reasons" for granting the Petitioners' Petition for a Writ of Certiorari, The case raises no federal constitutional issues. The issue raised by this case has been considered by numerous Courts of Appeals and there is no conflict between these Courts. The decision of the Court of Appeals in this case in no way conflicts with any prior decisions of this Court, is consistent with the legislative history of the statute in question and does not depart from the accepted and usual course of judicial proceedings. Therefore, the Respondents urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MATTHEW L. MYERS
ALVIN J. BRONSTEIN
EDWARD I. KOREN
National Prison Project
of the American Civil
Liberties Union Foundation
1346 Connecticut Avenue N.W.
Suite 1031
Washington, D.C. 20036
202-331-0500

ROBERT MANN
344 Wickenden St.
Providence, Rhode Island

*Attorneys for Respondents*